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SUPREME COURT, U.S.

NO. 82-660

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID W. DUNCAN
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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

David W. Duncan, on behalf of the Respondent, responds to the United States' Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

REASONS FOR DENYING PETITION

The Tenth Circuit Court of Appeals has adopted the test of "skill, judgment and diligence of a reasonably competent defense counsel" in determining claims of ineffective assistance of counsel. Dyer v. Crisp, 613 F. 2d 275 (en banc) (CA 10th 1980), cert. denied, 445 U.S. 945 (1980).

That test is consistent with the decisions of this Court and the government's contention that in order for a conviction to be set aside, the defendant must show, at a minimum, that an attorney's performance in the case was below that of reasonable, competent criminal defense counsel.

In addition, cases in the Tenth Circuit have established that "when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel. United States v. King, 664 F. 2d 1171, 1172-73 (10th Cir. 1981); United States v. Golub, 638 F. 2d 185, 187 (10th Cir. 1980)

Those circumstances include experience of counsel, time for preparation, accessibility of witnesses to counsel, gravity of the charge and complexity of

defenses. United States v. Golub, (id). The Tenth Circuit weighed all of these factors in its decision in this case.

The King - Golub tests are also consistent with the duty to provide effective assistance of counsel under the Sixth Amendment.

The Government cites Chambers v. Maroney, 399 U.S. 42, 53-54 (1970) for the proposition that relief is not afforded absent some finding of prejudice or likely prejudice to the defendant or adverse impact on the conduct of the case. (emphasis added) While such language is not the holding in Chambers, Justice Harlan in his dissent, did point out that this Court recognized long ago that the duty to provide counsel is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of this case (citing Powell v. Alabama, 287 U.S. 45, 71, 77 L. Ed 158, 172, 53 S. Ct. 55, 84 ALR 527 (1932); Hawk v. Olson, 326 U.S. 271, 278, 90 L. Ed 61, 66, 66 S. Ct 116 (1945).

Consistent with such a duty, the Tenth Circuit under its King - Golub tests reviewed (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of defenses; and (5) the accessibility of witnesses to counsel.

The Tenth Circuit did not hold that "an attorney's lack of relevant experience invariably gives rise to ineffective assistance of counsel," rather they held "that in the facts of this case, applying the criteria set down in King and Golub, Cronic cannot be said to have been adequately represented."

United States v. Morrison, 449 U.S. 321, 101 S. Ct. 665, 66 L. Ed 2d 564 (1981) is factually and legally distinguishable from the present case. Morrison held that pre-trial interference with the right to counsel did not warrant dismissing the indictment.

Finally, the Government's contention, that respondent's comments regarding the performance of his counsel are somehow relevant in determining effective assistance of counsel, is absurd.

Respondent's contention in this case is that the totality of the circumstances in this case amount to a violation of the Sixth Amendment guarantee of effective assistance of counsel. Those circumstances briefly reviewed are:

1. Respondent was indicted on thirteen counts of mail fraud and unlawful use of a fictitious name, 18 U.S.C. §§1341 and 1342, resulting from a four and one half year effort by the Government in front of a grand jury.

2. The Court made it clear to counsel that he would only have twenty-five days to prepare this case.

3. Counsel met with respondent at one lengthy meeting the day before trial.

4. The Government's investigation yielded thousands of documents, including hundreds of checks.

5. The Government's witnesses came from four states.

6. The respondent lived in Florida and Georgia while his counsel lived in Oklahoma.

7. Counsel announced to the jury that this was his first trial. He was not an experienced criminal defense attorney.

8. The Court granted counsel only $300.00 to hire an accountant. No accountant was hired.

9. The transcript denotes virtually no objections by either Colston or Rivas during the trial. The transcript denotes almost no activity on the part of Mr. Rivas, in spite of his affidavit submitted after the decision in this case was rendered by the Tenth Circuit.

10. Defense counsel did not object to any of the instructions or tender any defense instructions.

11. The respondent was convicted of eleven counts and sentenced to twenty-five years and fined $11,000.00.

As the government points out on Page 10 of their Petition for Writ of Certiorari, "the decisions of this Court make clear that in order for a conviction to be set aside under the Sixth Amendment on the basis of ineffective assistance of counsel, the defendant must show at a minimum that his attorney's performance in the case was below the range of competence that

reasonably may be expected of counsel in criminal cases." Respondent asserts that at a minimum such a showing has been made and that, under King, Golub and Powell, the circumstances of his appointment were such that he was precluded from giving effective aid in this case. The Tenth Circuit has employed a test in this case consistent with the Sixth Amendment and the decisions of this Court. To require this Court to make a factual determination of each case is beyond the purpose of the writ of certiorari and the practical limitations of this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 1982

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Harrison P. Cronic, moves the Court for leave to proceed in forma pauperis and to file a response to the United States' Petition for Writ of Certiorari without payment of fees and costs and in support thereof shows the Court as follows:

1. On April 19, 1982, the United States Court of Appeals for the Tenth Circuit vacated the judgment of conviction entered in the United States District Court for the Western District of Oklahoma.

2. On October 14, 1982, the United States filed a Petition for Writ of Certiorari in this case.

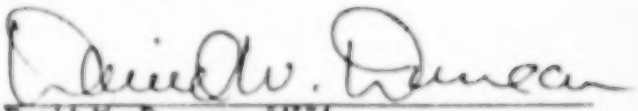
3. Petitioner is unable to pay the fees and costs of this proceeding or give security therefor and had counsel appointed both at trial in District Court and upon appeal.

4. The United States Court of Appeals for the Tenth Circuit appointed counsel for the respondent pursuant to the Criminal Justice Act of 1964. Leave to proceed in forma pauperis was sought and granted in the Tenth Circuit Court of Appeals.

WHEREFORE, respondent prays that he be allowed to proceed for forma pauperis and to file a response to the Petition for Writ of Certiorari without

payment of fees or costs and for such other and further relief as to the Court shall seem just.

Respectfully submitted,



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Petitioner

Vs.

HARRISON P. CRONIC,

Respondent

AFFIDAVIT OF TIMELY FILING

I, John N. Crudup, first being duly sworn according to law, depose and state the following:

-1-

I am a member in good standing with the Georgia Bar Association.

-2-

I was admitted to practice before the Supreme Court of the United States on October 22, 1962.

-3-

To my personal knowledge and in my presence, Harrison P. Cronic mailed, on November 29, 1982, to the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543, with first class postage prepaid, his Responsive Brief To The Petition For Writ Of Certiorari, by depositing a copy of the same into the United States Mail at Gainesville, Georgia 30501.

This satisfies the requirements for timely filing under Rule 28(.2) of the Rules of the Supreme Court of the United States.

JOHN N. CRUDUP
Attorney at Law
207 Jackson Building
Gainesville, Georgia 30501

Sworn to and subscribed
before me this 29 day
of November, 1982.

NOTARY PUBLIC

Notary Public, Georgia, State at Large
My Commission Expires April 28, 1985